

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE METROPOLITAN COUNCIL

In the Matter of the City of Lake Elmo's
Comprehensive Plan

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDED DECISION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck on Thursday, January 2, 2003, in the small hearing room at the Public Utilities Commission in the City of St. Paul, Minnesota. The hearing continued on two subsequent days and concluded on January 6, 2003. The written transcript of the hearing was received by the parties on January 27, 2003. The Metropolitan Council ("the Council") filed its written brief on January 31, 2003. The City of Lake Elmo ("the City") filed its written brief on February 10, 2003. The Council filed a response on February 14, 2003. The parties filed responses at the request of the ALJ on March 6, 2003 and March 7, 2003 and the record closed on March 7, 2003.

Thomas F. Pursell, Esq. and Forrest D. Nowlin, Esq., of the firm of Lindquist and Vennum, P.L.L.P., 444 Cedar Street, Suite 1700, St. Paul, Minnesota 55101, represented the City of Lake Elmo. Michael D. Christianson, Esq., of the firm of Smith Parker, P.L.L.P., 123 North Third Street, Suite 808, Minneapolis, Minnesota 55401 and David D. Theisen, Associate General Counsel, Metropolitan Council, Mears Park Centre, 230 E. Fifth Street, St. Paul, Minnesota 55101-1633, appeared for the Metropolitan Council.

NOTICE

This Report is a recommendation, not a final decision. The Metropolitan Council will make the final decision after a review of the record. The Council may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Council shall not be made until this Recommended Decision has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Recommended Decision to file exceptions and present argument to the Council. Parties should contact Peter Bell, Chair, Metropolitan Council, Mears Park Centre, 230 E. Fifth Street, St. Paul, Minnesota 55101-1633, to ascertain the procedure for filing exceptions or presenting argument.

If the Council fails to issue a final decision within 90 days of the close of the agency record, this report will constitute the final agency decision under Minn. Stat. §

14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Council, or upon the expiration of the deadline for doing so. The Council must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

The issue in this proceeding is whether or not the comprehensive plan submitted by the City of Lake Elmo to the Metropolitan Council “may have a substantial impact on or contain a substantial departure from metropolitan system plans” and whether the Metropolitan Council has statutory authority to require the modifications it has suggested.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

The Metropolitan Council

1. The Metropolitan Council is responsible for the long-range capital planning and programming of wastewater and transportation infrastructure in the Twin Cities metropolitan area.^[1] It was created in 1967 to coordinate regional solutions to pollution and transit problems and avoid sprawl.^[2] In 1976 the legislature adopted the Metropolitan Land Planning Act (MLPA) that required the Council to prepare plans to guide metropolitan land use.^[3] The legislature noted that developments in one local governmental unit may affect the provision of regional capital improvements for sewers, transportation and other infrastructure and therefore there is a need for coordinated plans, programs and controls by all local governmental units.^[4]

2. Under the MLPA, the Council is required to develop a comprehensive development guide for the metropolitan area that consists of policy statements, goals, standards, programs and maps prescribing guides for the orderly and economical development, public and private, of the metropolitan area. The development guide must consider land use, parks and open space land needs, the necessity for and location of airports, highways, transit facilities, public hospitals, libraries, schools, and other public buildings.^[5] The version relevant to this proceeding is called the 1996 Regional Blueprint.

3. The Council is also required to develop “metropolitan system plans” that set out the policy plans and capital budgets for wastewater and transportation service. The systems plans must substantially conform to the development guide.^[6]

4. Every Minnesota city is required to prepare a comprehensive plan that sets out its land use planning and projections.^[7] The comprehensive plan is implemented by adoption of a zoning ordinance that sets out matters such as the percentage of a lot which may be occupied, the size of yards and other open spaces and the density and distribution of population.^[8] A zoning ordinance may not conflict with the comprehensive plan.

5. The Metropolitan Council must review and comment on the comprehensive plan of each city in the metropolitan area to determine its compatibility with other comprehensive plans and metropolitan system plans.^[9] A city may not put a comprehensive plan into effect until the Council has acted on it.^[10]

Lake Elmo

6. Lake Elmo is a city of approximately 7000 people located about 10 miles east of St. Paul in Washington County. It is primarily rural. Historically, the City has sought to retain a rural character and development policy is and has been an important issue in Lake Elmo politics.^[11] It had 2,347 households and 1,635 jobs in 2000.^[12] There are nearly 40,000 jobs within five miles of Lake Elmo, however.^[13] It is bounded on the south by Interstate 94, and on the north by Highway 36. Interstate 694 is just to its west in the neighboring city of Oakdale. The City of Woodbury is just south of Lake Elmo. Stillwater and Oak Park Heights are to the northeast.

7. Lake Elmo has approximately 24 square miles within its boundaries. It contains substantial agricultural areas. At the center of the city is a 2200-acre regional park that includes two lakes. The developed areas in the city include a variety of housing types and values. The "Old Village" on the north and east sides of the Lake was the original historic settlement.^[14] The "Old Village" area is a mix of commercial development and urban-density residential on individual sewage treatment systems (ISTSS). The Tri-Lakes area in the northwest corner of the city is a residential area of mixed lot sizes.^[15] South of the Old Village, near I-94, is a 190 acre, 505 unit manufactured home park (Cimarron).^[16]

8. The southwest corner of the city, adjacent to I-94 has a 120-acre area that is presently served by metropolitan sewer and contains commercial development.^[17] This area is within the Metropolitan Urban Service Area (MUSA).^[18] The City requested and the Metropolitan Council granted sewer service to this area in 1992.^[19] The City had asked for a 440-acre extension to serve additional commercial and office use development along I-94 but at the time there was not adequate sewer capacity allocated to Lake Elmo to accommodate the expected sewer flow.^[20] The area is served by the WONE (Woodbury-Oakdale-Northdale-East Oakdale) interceptor, which does not have much additional capacity and could not support large-scale urbanization in Lake Elmo.^[21] Most of Lake Elmo is served by individual sewage treatment systems (ISTSS) and the city proposes to maintain and expand this system as necessary.

9. Because the WONE Interceptor will be fully utilized in the future, the Metropolitan Council staff began planning for additional wastewater service to Lake

Elmo in approximately 1996.^[22] The 1996 Capital Improvement Plan assumed some additional wastewater services to Lake Elmo by 2020.^[23] During 1998 an advisory committee, with representatives from Lake Elmo and other nearby cities met to consider alternatives for expanded capacity. Council staff attended two Lake Elmo city council meetings during 1998.^[24] After a public hearing, the Metropolitan Council adopted a plan on April 26, 2000 for a Lake Elmo interceptor that would run from south Lake Elmo westward.^[25] The proposed interceptor is included in the Council's Capital Improvement Program for 2002 – 2007 but has not been included in a capital budget.^[26]

10. In 1995, the Minnesota legislature required all metropolitan area cities to review and, if necessary, update their comprehensive plans by December 31, 1998.^[27] Due to a pending annexation proceeding, the City sought and obtained an extension for the submission of its comprehensive plan to the Council until December 31, 2000.^[28] However, the City did not submit its local comprehensive plan update to the Metropolitan Council staff until August 24, 2001. In February 2002, after the City provided additional information, the plan was deemed complete for Metropolitan Council review purposes.^[29]

11. The Council staff reviewed the City's plan update against the 1996 Regional Blueprint adopted by the Council and the metropolitan system plans adopted in conjunction with 1996 Regional Blueprint.^[30] Upon review the Council staff believed that the City's comprehensive plan had a substantial impact on and contained a substantial departure from metropolitan system plans and therefore required modification.

Lake Elmo's Land Use and Proposed Comprehensive Plan

12. The City's land use acreage table identifies four residential land use categories: urban residential, suburban residential, rural estates and rural agricultural development. The "urban residential" category is applied to the existing Cimarron manufactured housing development. No new "urban residential" is proposed in the City's Plan. The "suburban residential" category is applied to the existing residential development in the Old Village and elsewhere. And the "rural estates" is primarily the already existing conventional platting of three units per 10 acres or 2.5-3.67 acres per dwelling. Of the 818 acres identified as "rural estates", 747 (91%) have already been developed.^[31]

13. Under the City's proposed comprehensive plan, the majority of land in Lake Elmo is planned for development as "rural agricultural density" (RAD). RAD development normally occurs at a density of 16 units per 40 acres or one unit per 2.5 acres on cluster-platted lots with the undeveloped portion of the property placed in "permanent" easement. Lake Elmo is one of the foremost practitioners of rural cluster platting and is recognized as a regional leader in its approach to incorporation of permanent rural residential with permanent open space protection.^[32] The RAD land use category accounts for 6,874 acres in the City's 2002 land use map.^[33]

14. The current City land use map shows 754 acres set aside for current cluster development (open space preservation), which the comprehensive plan expands to most of the undeveloped area of the City.^[34] Cluster housing involves 16 to 18 housing units per 40 acres with lots of 3/4 acre to 1 acre. Half of the 40 acres are kept as open space.^[35]

15. Lake Elmo has approximately 6,038 acres of land zoned "Large Lot Residential." This land use designation includes areas of the City presently guided or zoned for residential minimum lot sizes between 2.5 acres and 10 acres. "Cluster development" of up to 16 houses per 40 acres on lots of .5 – 1 acres is permitted when at least 50% of the gross land area of the site is placed in a perpetual conservation easement.^[36]

16. Lake Elmo has approximately 2,035 acres of land zoned "Small Lot Residential" reflecting lot sizes of less than 2.5 acres. Of this amount, only about 67 acres remain undeveloped. Neighborhoods that feature lot sizes of less than 2.5 acres include the Old Village and the Tri-Lakes area, both of which were developed prior to the adoption of land use controls by the City.^[37]

17. Lake Elmo has approximately 2,175 acres of land currently being used for farming purposes and/or zoned agricultural.^[38]

18. Concentrations of existing commercial land uses in Lake Elmo are limited to the Old Village area and the 120-acre business park site at I-94 and Inwood Avenue. There are a small number of other existing commercial sites scattered through the City primarily along the I-94 frontage road, most of which predate the City's land use controls.^[39]

19. The City is interested in further commercial development along I-94. Specifically, the City would like to see high quality commercial office use along I-94.^[40]

20. In its comprehensive plan, the City identified the following four points to be its guiding planning policy:

1. Develop land use and infrastructure plans to accommodate household and population forecasts of the 1996 Regional Blueprint (12,500 persons in 4,700 households) by the year 2020.
2. Encourage the majority of the new households created to be efficiently developed in a rural context in the form of Open Space Development cluster neighborhoods; and, within the Old Village Area, as defined by the Old Village Plan/Policies.
3. Reestablish the Regional Blueprint designation of "Rural Growth Center" for Lake Elmo.

4. Limit Metropolitan Urban Service Area (MUSA) expansion to the area that can be served through the Metropolitan Council WONE Interceptor.^[41]

21. The City is not proposing to accommodate the amount of growth recommended by the Council. It is proposing to accommodate the Council's forecast growth through 2020, but on low-density lots throughout the city rather than within a defined area of higher average density.^[42]

22. The City's 2020 Land Use Plan provides for the 4,700 households and 12,500 population forecasted by the Council for the year 2020. In the City's Plan, however, residential growth is planned to occur primarily in the "cluster" mode that has been prevalent in the City since 1996. This results in a "spot density" of single family detached home sites approaching 2 units per acre but also preserves 50% of the gross area of the development site to permanent open space.^[43]

23. The City's comprehensive plan does not plan for an urban expansion through 2020 or for an urban reserve for future higher density development. And the City's plan proposed rural development at densities four times higher than that recommended by the Council.^[44]

24. In a letter to the Metropolitan Council dated October 29, 2001, Barry Johnson, the City Administrator of neighboring Woodbury, criticized Lake Elmo's low-density development plan. Mr. Johnson asserted that allowing cluster housing for the entire city at 17 dwelling units per 40 acres with on-site septic systems increases the demand for upgraded arterial road systems, drives up the cost of housing, and results in growth leap-frogging over Lake Elmo to other communities that have full utilities.^[45]

25. Lake Elmo has a major regional park facility with over 2,000 acres that is operated by Washington County.^[46]

The Council's 1996 Regional Blueprint

26. The 1996 Regional Blueprint was the Council's current regional plan for the Metropolitan Area until the Council adopted the updated Blueprint 2030 on December 19, 2002.^[47] The Blueprint is the land development guide for the metropolitan area. The 1996 Regional Blueprint was developed over a three-year period. It was adopted after many public hearings and meetings with local government units on various growth scenarios prepared by Council staff based on different land use patterns.^[48]

27. The Metropolitan Urban Service Area (MUSA) is the area within which the Council provides, or plans to provide, metro sewer service within a 20-year timeframe. The MUSA boundary delimits the outer reaches of regional services for the specified time period. It is a guideline that serves as both a commitment to provide service and a limit on urban development. Lands within the MUSA are developed at higher urban densities because they are served by the public sewer system.^[49]

28. The Council's 1996 Regional Blueprint contains a section entitled the "Regional Growth Strategy."^[50] The Regional Growth Strategy is the Council's way of guiding the development of the metropolitan area and providing regional services in a coordinated and cost efficient way.^[51]

29. The Council's metropolitan system plans that set out the policy plans and budgets for wastewater and transportation service incorporate the Regional Growth Strategy map contained in the Council's Regional Blueprint.^[52]

30. "Urban reserve" is a rural-to-urban transition area between the current MUSA line and the urban reserve boundary line. It is considered a reservoir of land outside the region's urban area needed to accommodate forecast growth to at least the year 2040. "Urban reserve" designates land within the Metro area that the Council wants cities and townships to preserve for future urbanization. The 1996 Blueprint contains an "urban reserve" that is not to be used before 2020 so that it can be developed after 2020 on a more dense scale. The Council wants cities to limit the density of current development in "urban reserve" areas to one unit per 40 acres.^[53]

31. The Regional Growth Strategy establishes standards calling for a minimum residential density of three dwelling units per acre in the "urban" areas; a maximum density of one dwelling unit per 40 acres or equivalent in the "urban reserve" area; and a maximum density of one dwelling unit per 10 acres in the "permanent rural" area.^[54]

32. The Council's Regional Growth Strategy calls for substantial urbanization of Lake Elmo by 2040. The Council based its determination on the region's (then forecasted) need to accommodate 320,000 new households and 380,000 new jobs in the metropolitan region between 1995 and 2020;^[55] the close proximity of Lake Elmo to St. Paul; the availability of principal arterials immediately adjacent to the City on the north and south sides; the potential for transit services to the community; the availability of regional wastewater services to serve the community in a cost-effective manner; and the availability of a regional park preserve within the City.^[56]

33. The Regional Growth Strategy identified three general planning areas within Lake Elmo: (1) an existing Urban Area of 120 acres in the southwest corner of the City adjacent to I-94; (2) an area of Urban Reserve covering approximately two-thirds of the remaining area of the City; and (3) an area of Permanent Rural covering the remaining approximately one-third of the City. And the Regional Growth Strategy map identified an area of illustrative 2020 Metropolitan Urban Service Area (MUSA) overlaying the western part of the City's Urban Reserve.^[57]

34. The Council's Regional Growth Strategy Policy Area map shows approximately 13 square miles of the City's 24 square miles in "urban reserve."^[58]

35. The Council's Regional Growth Strategy is based on the Council's forecasts of population, households and employment for the seven county metropolitan area for the year 2020.^[59]

36. The Council bases its forecasts of population distributions in part on annual building permit data.^[60]

37. The Council's household forecasts for regional planning purposes have been very close to actual census figures.^[61]

38. The Council's 1996 Regional Blueprint predicts that there will be 110,000 new households on the east side of the metropolitan area by 2020.^[62]

39. The Council's 1996 Regional Blueprint and regional system plans directed Lake Elmo to plan for expansion of its existing urban area through 2020 at a minimum density of three dwellings per acre; to plan for the approximately two-thirds of the remainder of the City to be Urban Reserve at a density of one dwelling per 40 acres; and to keep the remaining one-third of the City Permanent Rural at a density of one dwelling per 10 acres.^[63]

40. From 1990-2000, Lake Elmo's population growth was about 16.3 percent. For the same ten-year period, neighboring Oakdale's population growth was about 45 percent, Woodbury's growth rate was about 131 percent, and Cottage Grove's population growth rate was about 33 percent.^[64] Lake Elmo is generally less densely populated than its neighboring cities to the west, south and east.^[65]

Water Resources Management Policy Plan

41. The Council owns and operates the metropolitan wastewater service system, which includes 550 miles of interceptor sewers that receive wastewater from 103 communities and convey that wastewater through these communities to one of eight regional wastewater treatment plants.^[66]

42. There are three sewage treatment facilities located in the east metro area. One is on the St. Croix River in Stillwater, a second is in Cottage Grove on the Mississippi, and the third is the metro plant in St. Paul, which serves a large area including Forest Lake, Hugo and Mahtomedi.^[67]

43. The east metro area is located within Ramsey and Washington counties and includes the cities of Oakdale, Woodbury, Lake Elmo, Cottage Grove, St. Paul Park, Mahtomedi, Afton, Hugo, Forest Lake, Bayport, and Stillwater.^[68]

44. On December 19, 1996, the Council adopted the Water Resources Management Policy Plan (WRMPP) or wastewater system plan.^[69]

45. The WRMPP was adopted by the Council as a "metropolitan system plan" as defined by Minn. Stat. § 473.852, subd. 8.^[70]

46. The WRMP contains forecasts for sewerage population, housing and employment, and wastewater flow projections for each metropolitan area municipality for 2000, 2020 and 2040.^[71]

47. The WRMPP defines "urban reserve" on the Regional Growth Strategy Policy area map and states: "Its outer edge will become the Twin Cities area's urban

growth boundary” and “The Council will plan its regional sewer and transportation services and facilities based on the map.”^[72]

48. The Water Resources Management Policy Plan states: “The timing and density of development which is inconsistent with the Blueprint and which would affect the cost of providing sewer service will be viewed as a departure from or having a substantial impact on the metropolitan waste water system.”^[73]

49. Under the WRMPP, areas designated for urban development are to be sewered.^[74]

50. The WRMPP shows Lake Elmo as having 4,000 people in 1,500 sewered households by 2020, along with 1,000 sewered employees.^[75] The figures for Lake Elmo (and a few other communities) were qualified by a footnote that read:

“The sewered population, housing and employment values for these communities are based on a number of assumptions regarding a potential future line for the urban service area, which will be reviewed during the preparation of the comprehensive plan.”^[76]

51. There is most likely sufficient existing capacity in the WONE Interceptor (Woodbury-Oakdale-Northdale-East Oakdale) to take care of forecasted development in Lake Elmo until almost 2030.^[77]

52. Construction of the Lake Elmo Interceptor (LEI) is currently set to commence in 2007.^[78] As proposed, the LEI will consist of approximately four miles of 30 inch and 36 inch diameter gravity sewer at an estimated capital cost of \$10 million. The LEI will run parallel to I-94 to the Metro Treatment Plant.^[79]

53. The proposed Lake Elmo Interceptor will have 3.7 million gallons per day (mgd) capacity,^[80] which is enough to serve 13,500 households or residential equivalent units (RECs).^[81] The Council plans on allocating 70 percent of the interceptor’s capacity to Lake Elmo and reserving the remaining 30 percent capacity.^[82] The system statement calls for 1,700 sewered households in Lake Elmo in 2020. After allowing for the 30 percent unallocated reserve capacity, the remaining available capacity translates into 7,850 RECs at 274 gallons per day.^[83]

54. According to an analysis done by the Council’s Assistant General Manager of Environmental Services, if Lake Elmo’s projected growth were to go elsewhere, it would be more costly to add sewage treatment capacity to other areas of the metro area to accommodate that growth, than to build the Lake Elmo Interceptor.^[84]

55. The Council’s planned provision of regional sewer service to Lake Elmo is to serve existing and future urbanization in the community. It is not planned as a result of any need to provide public sewer service due to failing or deficient individual sewage treatment systems (ISTs).^[85]

56. Final design plans for the Lake Elmo Interceptor have not been drawn and no contracts have been let.^[86]

Transportation Plan

57. On January 24, 2001, the Council adopted the “Transportation Policy Plan.”^[87] The Transportation Policy Plan was adopted by the Council as a “metropolitan system plan” as defined by Minn. Stat. § 473.852, subd. 8.^[88]

58. Three principal arterial highways, I-94, I-694 and Trunk Highway 36, presently serve Lake Elmo.^[89] The City is bounded on the south by I-94, on the north by State Highway 36, and I-694 is one mile west of the City. State Highway 5, an A-minor arterial (the second highest class of regional highway), runs through the center of the City. In the three and one-half mile section of I-94 along the southern edge of the City, three interchanges serve residents of Lake Elmo and nearby communities. Two I-694 interchanges serve Lake Elmo residents.^[90]

59. I-94 will expand to remove the bottleneck from McKnight Road to Century Avenue and improve traffic flow within the next twenty-five years, perhaps by 2011, under the Council’s Transportation Policy Plan.^[91]

60. There is existing capacity on Highway I-94 through Lake Elmo. Average daily traffic on I-94 near Lake Elmo is 79,000 vehicles per day. Of comparable six-lane roadways in the metropolitan area, this is one of the lowest traffic counts. Highway I-35W, for example, carries 171,000 cars north of Highway 62 on the south side of the metropolitan area. Interstate I-394 carries 134,000 cars west of Highway 100 on the west side of the metropolitan area.^[92]

61. The Council recommends a housing density of approximately seven-units per acre as the standard for supporting cost-effective transit service.^[93]

62. Metro Transit abandoned service to Lake Elmo’s Cimarron manufactured housing development a few years ago because low densities and lack of riders to the west of Cimarron made the service too highly subsidized to continue.^[94]

63. Development in areas served by freeways that are at or near capacity results in less efficient use of existing freeway capacity.^[95]

The 1997 System Statement

64. In early 1997, the Council prepared and submitted to the City a document entitled “1997 System Statement”.^[96] The System Statement advised the City of the newly adopted Regional Blueprint and indicated what the City needed to plan for in updating its Comprehensive Plan.^[97]

65. The 1997 System Statement informed all the cities that one of the new features of the Regional Growth Strategy was “to establish a long-term 2040 Urban Reserve Boundary as a basis for identifying those parts of the region that will eventually become urbanized and those that will stay permanently rural.”^[98] The 1997 System Statement included forecasts of population, households and employment for the

metropolitan-area governmental units, and it identified wastewater flow forecasts for “sewered development”.^[99]

66. The System Statement advised Lake Elmo to expand its existing urban area by 1,500 sewerred households and 1,000 sewerred employees by 2020.^[100] The System Statement also advised the City to include an Urban Reserve area in its local comprehensive plan consistent with the Council’s Regional Growth Strategy.^[101]

67. The 1997 System Statement identifies I-94 as a freeway transit corridor and states that the City’s Comprehensive Plan should identify opportunities for development within one-quarter mile of this corridor.^[102]

68. The City did not challenge or raise any questions about the contents of the 1997 System Statement, nor did it request a hearing under Minn. Stat. § 473.857 within 60 days of receiving the statement.^[103]

69. No municipality has ever requested a hearing based on a systems statement in the history of the Metropolitan Council even though cities do not always agree with the statements.

Metropolitan Council Action

70. The Council’s determination that the City’s proposed low-density development with on-site septic systems will make future urbanization cost prohibitive is based in part on a 1994 study by the Builders Association of the Twin Cities Area (BATCA).^[104]

71. In July 2002, the Council prepared three alternative planning maps for City officials to consider in an attempt to resolve their differences.^[105] The Council staff presented the three alternatives to the City at a meeting with City’s mayor, administrator and some of the City Council members. The City was not interested in any of the alternatives.^[106] The alternatives maintained the Council’s forecast of 7,850 residential equivalency units (RECs) but increased the density levels so that more land could be kept in “rural”.^[107] For example, alternative #1^[108] proposes the 2020 urbanized area to develop at 3 dwelling units per acre or 10 employees per acre. Alternative #2,^[109] proposes 4 dwelling units per acre and 20 employees per acre, which results in a smaller urban reserve area and 81 percent of the City’s land remaining “rural.” And alternative #3,^[110] reflects a residential density of 5 units per acre and 40 employees per acre, which results in approximately 86 percent of the City’s land remaining “rural”.^[111]

72. If development does not occur in Lake Elmo at the densities predicted by the Council, it is possible that the growth will occur in other locations where it will be more expensive to provide urban services.^[112]

73. Between 1986 and 1996 the Council required modification of 11 comprehensive plans and 17 plan amendments for metropolitan area cities. In the last 26 years the Council has required 33 and perhaps as many as 50 plan

modifications.^[113] Requests to modify comprehensive plans are normally resolved in discussions between the Council staff and City officials.

74. Most of the disagreements between the Council and municipalities about comprehensive plans have involved plans that demand too much capacity from metropolitan systems.^[114] Only a few disagreements have involved underutilization of metropolitan systems. Those few included plans submitted for Eagan, Hugo, Rosemount, and Ramsey that proposed fewer households than the Council projected. However, in each case, the city had existing underutilized metropolitan sewer availability. Each of these disagreements was resolved.^[115]

75. On August 6, 2002, at a special meeting, Council staff and Lake Elmo officials made presentations to the Metropolitan Council concerning the proposed comprehensive plan.^[116]

76. At its September 11, 2002 regular meeting the Metropolitan Council, after hearing from the staff and Lake Elmo's mayor, adopted a resolution finding that the City's comprehensive plan update substantially departed from and has a substantial impact on metropolitan system plans and, therefore, had to be modified. The Council's resolution included an attachment setting out a list of required modifications to the comprehensive plan.^[117]

77. The required modifications include:

- expansion of the MUSA to accommodate the number of sewerer households and employees projected in the water resources plan.

- provide for a minimum density of three units per acre for sewerer households and an appropriate number of sewerer employees per acre.

- provide an urban reserve district at a maximum density of one dwelling per acre for future urbanization (at least three units per acre) that will accommodate 7,850 residential equivalent units (RECs) of regional sewer capacity.

- may plan for remainder of city to be "permanent rural" provided that the overall density is no greater than one unit per ten acres.^[118]

78. Upon receipt of the resolution from the Metropolitan Council, the Mayor of Lake Elmo requested a contested case hearing under Chapter 14 of Minnesota Statutes and this proceeding ensued.^[119] This is the first contested case proceeding resulting from a failure of the Council and a city to agree on the content of a comprehensive plan.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Metropolitan Council and the Administrative Law Judge have jurisdiction in this matter under Minn. Stat. §§ 473.866 and 14.50.

2. That proper notice of the hearing in this matter was given and all other substantive and procedural requirements of law or rule have been met.

Comprehensive Plan Modification

3. Minn. Stat. § 473.175 of the Metropolitan Land Planning Act (MLPA) provides in relevant part as follows:

Subdivision 1. The council shall review the comprehensive plans of local governmental units... to determine their compatibility with each other and conformity with metropolitan system plans. The council shall review and comment on the apparent consistency of the comprehensive plans ... with adopted plans of the council. *The council may require a local governmental unit to modify any comprehensive plan or part thereof which may have a substantial impact on or contain a substantial departure from metropolitan system plans.*^[120]

4. Minn. Stat. § 473.852, subd.8 provides:

“Metropolitan system plans” means the airports and transportation portion of the metropolitan development guide, and the policy plans and capital budgets for metropolitan wastewater service, transportation, and regional recreation open space.

5. That the Metropolitan Council has the burden of proof to show by a preponderance of the evidence that the comprehensive plan update of the City of Lake Elmo has a substantial impact on or contains a substantial departure from metropolitan system plans.^[121]

6. That the Metropolitan Council has demonstrated by a preponderance of the evidence that the City’s comprehensive plan has a substantial impact on and contains a substantial departure from metropolitan system plans.

Systems Statement

7. Minn. Stat. § 473.857 provides that a systems statement provided to a city by the Council becomes final if the city does not request a hearing to contest the statement within 60 days.

8. That the City of Lake Elmo did not request a hearing on the systems statement issued to it on January 3, 1997.

9. That the systems statement does not have a binding effect on this contested case proceeding.

Motion in Limine

10. Minn. Stat. § 473.866 provides for the contested case hearing in this matter and states in part that, “The subject of the hearing shall not extend to questions concerning the need for or reasonableness of the metropolitan system plans or any part thereof.”

11. That the Council filed a motion in limine seeking the exclusion of evidence concerning the need for or reasonableness of the Council’s wastewater and transportation plans and its Regional Blueprint.

12. That the motion in limine is GRANTED.

Metropolitan Council Authority

13. That Minn. Stat. § 473.175, subd. 2 states in part that:

No action shall be taken by any governmental unit ... to place any such comprehensive plan ... or part thereof into effect until the Council has returned the statement to the unit or district and until *the local governmental unit has incorporated any modifications in the plan required by a final decision, order or judgment made pursuant to section 473.866.*^[122]

14. That Minn. Stat. § 473.866 also states that:

Within 30 days after the receipt of the [ALJ’s] report the council shall, by resolution containing findings of fact and conclusions, *make a final decision with respect to the required modifications of the comprehensive plan.*^[123]

15. That the Council has demonstrated its statutory authority to require modifications to the City’s comprehensive plan.

Costs

16. That Minn. Stat. § 473.866 also provides in part that:

In the report of the administrative law judge the costs of the hearing shall be apportioned among the parties to the proceeding.

17. That the costs of the hearing shall be split equally between the City of Lake Elmo and the Metropolitan Council.

18. That citations to exhibits or the transcript in these Findings of Fact do not mean that all evidentiary support in the record has been cited.

19. The Conclusions are arrived at for the reasons set out in the Memorandum which follows and which is incorporated into these conclusions by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDED DECISION

IT IS HEREBY RECOMMENDED: That the Metropolitan Council require the City of Lake Elmo to modify its comprehensive plan.

IT IS HEREBY ORDERED: That each party shall pay one-half of the costs of the hearing in this matter.

Dated this 13th day of March 2003.

/s/ George A. Beck

GEORGE A. BECK

Administrative Law Judge

Reported: Kirby A. Kennedy & Associates
(952) 922-1955
Transcript Prepared

MEMORANDUM

The Metropolitan Council reviews the comprehensive plans of each city in the metropolitan area to determine the plan's compatibility with other comprehensive plans and metropolitan plans for systems such as wastewater and transportation. If the Council determines that a plan is not compatible it suggests modifications to the comprehensive plan. Most disagreements are negotiated by the parties. This contested case proceeding is the first formal challenge by a city to modifications required by the Council, and to its authority to do so.

Motion in Limine

Immediately before the hearing in this matter, the Metropolitan Council submitted a Motion in Limine seeking an order excluding certain testimony that was to be offered by Lake Elmo. The motion is based upon statutory language specifically pertaining to this contested case proceeding, that provides that "the subject of the hearing shall not extend to questions concerning the need for or reasonableness of the metropolitan system plans or any part thereof."^[124]

The Metropolitan Council argues that the city has presented evidence that challenges the need and reasonableness of its wastewater system plan by attempting to show that the City does not require additional sewer capacity, that onsite community treatment systems are environmentally acceptable, and that onsite treatment systems can meet all wastewater treatment needs. The Council also asserts that evidence challenging its population, household and employment forecasts is not admissible, nor is evidence that challenges the creation of an urban reserve area, a permanent rural area and their minimum density goals.

The City argues that the testimony cited goes to the question of whether or not population diverted from Lake Elmo by its proposed comprehensive plan could be accommodated elsewhere. The City believes this is relevant to the question of the regional impact of the City's plan. However, the regional issue is really only touched on by the testimony in question, which primarily attempts to refute the need for the sewer system intended to serve Lake Elmo, that is described in the wastewater system plan. The City also argues that the Council opened the door to this evidence by offering similar evidence. In fact, some evidence offered by the Council did address matters such as capacity of the interceptor system and where people might live as an alternative to Lake Elmo. However, the Council did not offer testimony directly in support of its proposed wastewater system plan. Furthermore, the Council cannot waive the specific legislative directive that this proceeding shall not consider the need and reasonableness of system plans. The legislative intent must be implemented.

Finally, the City argues that the testimony in question should be admitted because of the unique standard of appellate review in this matter. As the City points out, the normal standard of review of factual findings in an administrative proceeding is for the appellate court to determine whether or not there is substantial evidence in the record to support an agency decision.^[125] In this case the scope of review is modified to provide that the appellate court will not give preference to either the ALJ's recommended decision or the final decision of the Metropolitan Council. But rather, the decision of the Court must be based upon a preponderance of the evidence contained in the record on appeal.^[126] The City suggests that the evidence in question is necessary to support its claim that an adverse decision would be arbitrary and capricious.

The unique appeal provision does reflect a legislative intent to provide much more than the normal scope of review to the Court of Appeals. This does not necessarily mean, however, that the legislature also intended for it to review the reasonableness of the system plans. The Administrative Law Judge concludes that the evidence provided by the City as to the merits of the City's waste disposal systems and to the Council's sewer plan goes to the plans' need and reasonableness and must be excluded. However, the evidence does remain in the record as an offer of proof should the Metropolitan Council or the Court of Appeals wish to reconsider this ruling. But it is excluded for the purpose of the decision by the Administrative Law Judge.^[127]

Arbitrary and Capricious

The City argues in its post-hearing brief that the resolution setting out modifications to its comprehensive plan is arbitrary and capricious. Generally, the phrase arbitrary and capricious, as used in the Administrative Procedure Act, has been defined as requiring a showing that the agency's determination "represents its will and not its judgment."^[128] So long as an agency is engaged in reasoned decision-making, a court will affirm.^[129] The City believes that the Council's determination has no basis in the evidence. It suggests, for example, that the Council must prove that people diverted from Lake Elmo will move someplace else where it is more expensive to serve them.

The City's argument is premature, however. The standard of arbitrary and capricious is clearly an appellate standard to be applied in judicial review of a contested case proceeding decided by an administrative agency.^[130] The case law cited above makes this clear; it is not an argument to be considered by an Administrative Law Judge or the agency in the disposition of a trial-type proceeding. The standard is to be applied to the final agency decision which has not yet been rendered in this matter. The City's arguments can be considered by the Court of Appeals, if necessary.

System Statement

On January 3, 1997 the Metropolitan Council issued a system statement to the City of Lake Elmo.^[131] A system statement is sent to all metropolitan cities and is intended to advise cities of how the metropolitan system plans affect individual cities. The Council points out that, by statute, if a system statement is not challenged within 60 days of receipt, it becomes final.^[132] The City of Lake Elmo did not request a hearing to contest the system statement. The Council therefore believes that it is binding in this proceeding. Although most of the system statement is general information, the statement did advise Lake Elmo that the water resources management plan forecasted a sewered population in Lake Elmo of 4000 by 2020, sewered housing of 1500 by 2020, and sewered employment of 1000 by 2020.^[133] The system statement did not advise Lake Elmo of its statutory right to appeal.

The City asserts that any binding provision in the system statement is contradicted by the assertion in the statement that the Council wanted to work with the City to make necessary planning changes in its local comprehensive plan to accommodate growth and development.^[134] There has apparently never been a request for a hearing on a system statement because their contents are often subject to negotiation. The City also points out that the system statement has no mention of any "Lake Elmo interceptor" and mistakenly states that the City has no existing metropolitan sewer service. The population figures for Lake Elmo contained in the statement are footnoted and the footnote indicates that the population housing and employment figures will be reviewed during the preparation of the comprehensive plan. In short, there appears to be little that is actually final in the statement. Neither is there any indication that it was intended to affect a later challenge to suggested modifications for a comprehensive plan. To do so would abridge the City's right to review under Minn. Stat.

§ 473.866. The systems statement has therefore been given no binding effect in this proceeding.

Contents of System Plans

The Council's authority to review comprehensive plans allows it to modify a plan which may have a substantial impact on or contain a substantial departure from *metropolitan system plans*.^[135] The legislature defined metropolitan system plans as:

the airport and transportation portions of the metropolitan development guide, and the policy plans, and capital budgets for metropolitan waste-water service, transportation, and regional recreation open space.^[136]

Lake Elmo argues that the Council has inappropriately measured its comprehensive plan against the metropolitan development guide, in this case the 1996 Regional Blueprint, which the City believes is not included within the definition of metropolitan system plans. Central to this dispute are the Council's forecasts for population growth in Lake Elmo after 2020. The population figures, contained in the regional growth strategy portion of the Regional Blueprint, have nothing to do with metropolitan systems as such, in the City's view. The City asserts that the legislature specifically distinguished between the system plans and the development guide and did not give the Council authority to enforce an overall development plan.

In support of its argument the City notes that its zoning authority includes reference to the density and distribution of population and argues that the Council's resolution abrogates its local zoning authority. The City also offered the testimony of John Boland, an early chair of the Metropolitan Council, who described the compromises necessary to balance the prerogatives between cities and regional government. He believes that the Metropolitan Council had power with regard to metropolitan systems and that local government units had the power with regard to their comprehensive plans, provided that those plans did not call for the premature utilization of a metro system or adverse impact on a metro system.^[137] He does not believe that it was intended that the Metropolitan Council could force a community to take metropolitan sewer. The City also argues that since there is little metropolitan system presence in Lake Elmo, it has no power to conflict with a metropolitan system.

In response, the Council points out that the population forecasts and the regional growth strategy are a part of the system plans since the system plans explicitly incorporate and build upon that material. The forecasts are reproduced in their entirety in the plans.^[138] Furthermore, the legislature has spoken as to the contents of the system plan by not only indicating that it must conform to the development guide but that it must specifically include forecasts of changes in the general levels and distribution of population households employment and land use in the metropolitan area.^[139]

The City does not explain how planning could be accomplished without the forecasts which it challenges. It seems unlikely that a system plan could be constructed

without population and employment projections. The City does not articulate how this might be accomplished where extensive planning must precede construction. Although population projections have sometimes been adjusted in negotiations with cities, there does not seem to be any statutory requirement that this be done. Additionally, the statutory definition of metropolitan system plans refers at least to the transportation portion of the metropolitan development guide. It seems clear that the legislature intended that the Metropolitan Council rely upon population and employment forecasts in developing system plans. Planning for events in 2020 or 2040 cannot be done without forecasting.

Substantial Impact and Substantial Departure

The preeminent issue in this proceeding is whether or not the City's comprehensive plan may have a substantial impact on or contain a substantial departure from a metropolitan system plan. The Metropolitan Council must prove that this is the case before it may require Lake Elmo to modify its plan. There are no statutory or rule definitions of "substantial impact" or "substantial departure." The Council and its staff have applied these terms on a case by case basis over the years in reviewing comprehensive plans and planned amendments. The system plans contain some guidance. The water resources management policy plan (the wastewater system plan) indicates that plans which create additional costs for the region may have a substantial impact or be viewed as a departure from the policy plans.^[140] The transportation plan suggests that development inconsistent with Metropolitan Council forecasts, either too much or too little, may constitute a substantial departure.^[141]

The City points out that a Council witness gave an example of substantial impact as something that would require a great deal of money to fix or a demand for service that cannot be met. The witness gave an example of substantial departure as failure to use a system already in place. The City suggests that these examples should be the exclusive definitions for the terms since it does not believe that it is either wasting an existing asset or presenting an expensive consequence for the system. However, the descriptions contained in the system plans and that offered by the Council's witness are examples rather than exclusive definitions. It does not appear to be appropriate to adopt a particular definition of the terms, especially where the legislature did not do so. The dictionary meaning of substantial pertains to something that is "considerable in importance, value, degree, amount, or extent."^[142] Substantial, then, excludes minor effects.

The Council argues that the City's comprehensive plan substantially departs from the wastewater systems plan because the City plan does not allow for sewerage households or employment as prescribed in the wastewater system plan. The City's plan does not contain the urban reserve area requested by the Council to protect land for future development at the densities described in the system plans.^[143] The City's plan permits development everywhere at a density of 6 units per 20 acres or 16 units per 40 acres. That means that at the densities proposed by the City, it could be essentially full by the year 2020.

The Council wants the City's urban area to develop at three units per acre. The City's current cluster development is at a half unit per acre (a factor of 6 to 1 in terms of density). The Council also wants the City's urban reserve to be kept at a density of no more than 1 unit per 10 acres, which is about 1/20th of the cluster density. In addition, the Council wants the 1 unit per 10 acres urban reserve to be designed in such a way that in the future it can be developed at one unit per three acres ("ghost platting").^[144] The identification of an urban reserve, where development is limited at present in order to accommodate urban density development after 2020, allows the Council to specify areas where future growth can be served most cost-effectively.

The difference between the Council's Resolution and the City's plan is density - how each proposes to place the population and households on the land. The City has accepted the Council's 2020 population/household/employment forecasts, but the City wants to spread the households out in cluster developments. The City has not made 2040 forecasts.^[145]

While Lake Elmo's plan proposes only 200 fewer households than the Council's 2020 household forecast of 4,700, it fails to provide for any of the 1,500 sewer households identified in the regional system plan for water resources management.^[146] The City has never agreed to provide 1,500 sewer households by 2020. Instead, the City's plan proposes to accommodate approximately 2,000 new households by 2020 with service from either individual sewage treatment systems (ISTs) or constructed wetlands wastewater treatment systems (CWWTS).^[147]

The City does not directly address the differences between its plan and the system plans. Rather, it argues that its comprehensive plan will not harm the metro sewer system. In fact, it argues it will save the system ten million dollars by not requiring an interceptor to Lake Elmo. The City does not argue, however, that its plan does not depart from the system plans in a substantial manner. In fact, its city planner described the plans as being "180 degrees" apart.^[148] The difference between the plans is certainly "considerable in extent" and constitutes a substantial departure within the meaning of the statute.

The Council also argues that Lake Elmo's plan will have a substantial impact on the wastewater system plan because it would increase the cost of providing regional sewer service. It argues that the City's failure to protect an urban reserve area to accommodate forecasted growth will prompt demands on regional sewer elsewhere, where it will be more expensive. The Council's assistant general manager for environmental services testified as to the higher construction and operation costs elsewhere in the region.^[149] The City counters that this claim by the Council is hypothetical and unsupported by evidence. It argues that this speculation is based on a demographic assumption of concentric ring growth and that alternative move decisions would be extremely site specific. But the force of the Council's testimony is not based upon projecting growth in a specific area if the comprehensive plan is adopted, but to show consequences to the system as a whole.^[150]

The Council argues that, as set out in the wastewater system plan, the City's plan is inconsistent with the growth management strategy and will affect the cost of providing metropolitan sewer service. In this regard the Council points out that the statute only requires that the Council show that there "may" be a substantial impact on system plans. The City suggests that the Council must provide more than a mere showing that something might happen. The use of the word "may" does suggest that the Council must demonstrate something more than a mere possibility, but something less than that a substantial impact is more likely than not.

The Council is not required to prove that families diverted from Lake Elmo will settle in any other particular area. The legislature likely intended that a reasoned argument supported by expert testimony would suffice. It has established that growth diverted from Lake Elmo due to the proposed comprehensive plan will cause added burden on facilities elsewhere and that it will likely be more expensive to expand those facilities than it will be to serve Lake Elmo. The Council has proved that there *may* be a substantial impact on the systems plan for wastewater if Lake Elmo adopts its comprehensive plan.^[151]

The City also argued that its plan would not have the substantial effect of other underutilization cases where substantial unused capacity was already in place. In the other cities the pipe was already in the ground and available. This is an important distinction and should be addressed by the Council as a matter of policy in negotiating a final comprehensive plan. However, it is not an argument that would restrict the Council's statutory authority to find a substantial departure or impact. A substantial impact would not necessarily have to be a situation where unused capacity was already available to a city.

The Council asserts that the City's plan would also have a substantial impact on the transportation system plan because it would result in underutilization of existing and planned highway infrastructure and would promote development at low densities unsuited to public transit service. The record indicates that the average daily traffic on Interstate 94 near Lake Elmo is 79,000 vehicles per day.^[152] The counts on other six lane freeways, such as Interstate 35W and Interstate 394 at comparable spots in the metro area, are substantially higher. The Council believes that if households and employment are not sited along I-94 east of St. Paul, it will go elsewhere, creating additional highway and transportation demand.^[153] The City points out that the Metropolitan Council already provides bus service to Lake Elmo and that Lake Elmo would not be required to develop a density sufficient for cost efficient transit. In regard to highways, the City does not believe that it has been shown that the urban development diverted from Lake Elmo is likely to cause additional infrastructure to be built elsewhere. It suggests that regional highways are already congested and that less density in Lake Elmo will have little impact on the system.

The Council has not demonstrated that the difference between the density it recommends in Lake Elmo and that desired by Lake Elmo would constitute a substantial impact as to public transit service. Nonetheless, the traffic data submitted, as well as the expert testimony as to the likely effects of the City's plan by the Council

transportation planner (which was essentially unchallenged) is sufficient to demonstrate that there may be a substantial impact from the City's comprehensive plan.

The City challenges the authority of the Council to cause modifications to its comprehensive plan. The relevant statutes^[154] clearly indicate that the Council is in the position of a final decision-maker as to changes that must be made to a comprehensive plan submitted by a city, where the plan substantially departs from or substantially impacts a system plan. The Court of Appeals has also stated that the MPLA preempts inconsistent local zoning authority in order to ensure that comprehensive plans are reasonably compatible with those of other communities.^[155] The question of whether that authority includes instances of underutilization is considered above.

Minn. Stat. § 473.871

The parties were asked to address the applicability of Minn. Stat. § 473.871 to this proceeding. It provides that:

Notwithstanding the provisions of sections 462.355 subdivision 4, 473.175 and 473.851 to 473.871 the council shall have no authority under this chapter to require a local government unit to construct a new sewer system.

At first blush the language might appear to prohibit the Council from requiring the City to construct a local sewer infrastructure even after an interceptor was built to the City.

However, the statutory definition of "sewer system" includes more than the local infrastructure. It is defined as:

[P]ipelines or conduits, pumping stations, and force mains, and all other construction, devices, and appliances appurtenant thereto, used for conducting sewage or industrial waste or other wastes to a point of ultimate disposal.

According to the Pickart affidavit, at the time § 473.871 was updated in 1976, wastewater management was handled by several sanitary districts and local communities and included local treatment plants.^[156]

It seems logical therefore, to interpret § 473.871 to mean that the Council cannot force a community to build an entire sewer system, i.e. "to the point of ultimate disposal", which would need to include the pipe to a treatment plant. This interpretation is consistent with Minn. Stat. § 473.515, subdivision 3 that allows the Council to require a city to connect its disposal system to a metropolitan disposal system when the opportunity is provided.^[157] It is also consistent with the Council's authority to plan and build regional infrastructure as set out in the MLPA.

Conclusion

The Metropolitan Council believes that this contested case proceeding is a direct challenge to the Metropolitan Land Planning Act and the concept of regional planning. It believes that if Lake Elmo is able to disregard regional planning guidelines that any city would be free to do so. It is the City's viewpoint that the Metropolitan Council is inappropriately extending its authority to force population growth through unwanted extensions of its wastewater system. It asserts that the local government which does not choose to rely on the metropolitan sewer system for growth has a right to determine its own destiny. It points out that it has planned for the population growth desired by the Council through 2020. But, if that growth occurs, Lake Elmo would be fully settled by that date and adjacent communities would be much more densely settled. It believes that the Council is encroaching upon its zoning authority and that the Council should revise its plans and forecasts to shift people and funding to communities which might welcome additional development.

The record makes it clear that the Metropolitan Council is, as its resolution indicates, calling for substantial urbanization in Lake Elmo by 2040. The construction of a new interceptor to Lake Elmo will undoubtedly increase the pressure for development in the City.^[158] The Council sees the City's proposed land use as resulting in underutilization of planned metropolitan systems. The requirement for an urban reserve district as well as the Council's forecasts for population, households and employment require the City to develop at a greater density than it desires.

However, the legislative intent reflected in the statutes as they presently stand provide the Metropolitan Council with authority to require modifications to comprehensive plans that depart from or have an impact on its system plans in a substantial manner. The City's plan substantially departs from the system plans. Although it may infringe upon a city's right to determine how it will grow, the MLPA authorizes the Metropolitan Council to require uniform growth in the metropolitan area if it is necessary to a planned, orderly and staged development.^[159] If this is not the legislative intent, then legislation will be needed to clarify that underutilization of metropolitan systems is not within the Council's authority.

A final decision consistent with this report does not necessarily mean that the City will not be able to accomplish many of its goals. The Metropolitan Council has indicated that it is still prepared to negotiate further to come to an agreement on the comprehensive plan, as it has done with other communities. The possibilities for a compromise have not been fully explored at this point. For example, the Council staff expressed a willingness to accept cluster development in the permanent rural area and possibly in urban reserve.^[160] Lake Elmo need not be as urbanized as its neighbors.

Costs

Finally, the statute governing this contested case proceeding requires the Administrative Law Judge to apportion the costs of the hearing among the parties to this proceeding. The parties did not argue this question in the post-hearing briefs.

However, there appears to be no good reason to apportion the costs in this matter in a way other than to split them equally between the two parties. The City by its appeal requested the hearing to be held. The Metropolitan Council is required by law to prove the matter at issue in this proceeding and is the final decision-maker. It is therefore ordered that each party will pay one-half of the billings issued by the Office of Administrative Hearings to the Metropolitan Council in this matter.

G.A.B.

Exhibit C

Lake Elmo's Individual/Alternative Sewage Treatment Systems

Except for the 120 acres of commercial development in the southwest corner of the City, Lake Elmo has developed on individual or alternative sewage treatment systems. The City's cluster developments, for example, are served by constructed wetland treatment systems.^[161]

Individual homeowners, homeowner associations, and other private entities are responsible for ownership and operation of individual septic treatment systems and alternative wastewater disposal systems, including wetland treatment systems. Design and operation of these systems is governed by regulations and permits issued by the Minnesota Pollution Control Agency and local units of government.^[162]

Proper operation of on-site septic treatment systems and alternative wastewater disposal systems requires pumping and disposal of the residual solids slurry generated during wastewater treatment. This slurry, referred to as "septage", is a high strength waste product with organic and solids content 50 to 100 times that of wastewater.^[163]

For a fee, the Council handles the treatment and disposal of septage at designated locations and wastewater treatment plants.^[164] Currently the fees charged by the Council do not cover all of the Council's septage treatment and disposal costs.^[165] The Council has the discretion, however, to set higher fees to recover more of its costs.^[166]

Septic system technology has improved over the years and the quality of treated septic water entering the environment can be as high as or in some cases surpass treated municipal water.^[167]

Lake Elmo has a very good inspection, monitoring, and management program for its individual sewage treatment systems that is consistent with the Minnesota Pollution Control Agency's and the Council's requirements.^[168] Failure of these systems is less likely to occur in Lake Elmo than in other metro area cities due to the City's more frequent required pumping (every two years instead of every three years) and mandatory at-grade maintenance holes.^[169]

In 12 locations scattered throughout the city, nitrate concentrations in Lake Elmo's groundwater were above the drinking water standard of 10 milligrams per liter. The potential sources of the nitrates include septic systems, industry, and agriculture, including feedlots and fertilizers.^[170]

Lake Elmo built approximately 200 on-site septic systems in the 1980s to replace non-conforming or deficient ones that had been built in the 1960s or earlier.^[171]

Unlike individual sewage treatment systems, the regional wastewater system is monitored by professional staff on a 24-hour per day basis.^[172]

^[1] Minn. Stat. § 473.146 and .149. The Council also plans for airports and recreational open space—matters that are not at issue in this proceeding.

- [2] Ex. 40, pp. 2-3; Ex. 24, p. D00596
- [3] Ex. 40, p. 5.
- [4] Minn. Stat. § 473.851.
- [5] Minn. Stat. § 473.145.
- [6] Minn. Stat. § 473.146, subd. 1.
- [7] Minn. Stat. § § 462.355, 473.856.
- [8] Minn. Stat. § 462.357, subd. 1
- [9] Minn. Stat. § 473.175, subd. 1.
- [10] Minn. Stat. § 473.175, subd. 2.
- [11] T. 225, 261; Ex. 48, p. 18.
- [12] Ex. 3, p. 00114.
- [13] Ex. 3, p. 00114.
- [14] Ex. 26, p. 2.
- [15] Ex. 56.
- [16] Ex. 56; T. 364.
- [17] T. 268.
- [18] The MUSA is a line on the metropolitan map in the Regional Blueprint that indicates the area within which metropolitan sewer service is planned to be provided within a 20 year time frame. Ex. 46, p. 6.
- [19] Exs. 26, 27
- [20] T. 91.
- [21] T. 268, Ex. 37, p. 9.
- [22] Ex. 18, p. D00553
- [23] Ex. 31, App. B
- [24] T. 91-92.
- [25] Ex. 18, p. 00557; Ex. 21, p. D00570.
- [26] Ex. 18, p. D00558
- [27] Minn. Stat. § 473.864, subd. 2.
- [28] Ex. 24, p. 8.
- [29] Ex. 24, p. 18.
- [30] Ex. 24, p. 20. The Regional Blueprint and the metropolitan system plans are part of the comprehensive guide for the metropolitan area required by Minn. Stat. § 473.145.
- [31] Ex. 3, pp. D00126-127; Ex. 56; Dillerud T. 363-365. The City's current land use plan (Ex. 56) is attached as Ex. A.
- [32] Ex. 3, pp. D00114, D00127; Ex. 56; Dillerud T. 366-69.
- [33] Ex. 56.
- [34] Exs. 48, 56.
- [35] Dillerud T. 365.
- [36] Ex. 48, pp. 15-16.
- [37] Ex. 48, pp. 15-16.
- [38] Ex. 48, p. 15.
- [39] Ex. 48, p. 16.
- [40] Hunt T. 270-271, 303.
- [41] Ex. 48, p. 19.
- [42] Ex. 18, p. 14 (Pickart); Ex. 48.
- [43] Ex. 48, p. 32.
- [44] Ex. 24, pp. 20-21 (Uttley); Ex. 48.
- [45] Ex. 59; Dillerud T. 403.
- [46] Ex. 48, pp. 5, 17; Ex. 56.
- [47] Ex. 46, p. 5.
- [48] Ex. 7; Ex. 46 p. 5.
- [49] Ex. 7, p. 83; Ex. 46, p. 6.
- [50] Ex. 7, pp. 43-65.
- [51] Ex. 24, p. 16 (Uttley). The regional growth strategy map (Ex. 25) is attached as Ex. B.
- [52] Uttley T. 123; Thompson T. 525; Ex. 10, p. 4; Ex. 12, pp. 13, 55-59; Ex. 18, p. 5; Ex. 25.
- [53] Ex. 7, p. 82; Ex. 46 p. 7.
- [54] Ex. 3, pp. D00110—00111; Ex. 7 pp. 51, 53, 76.

- [55] Ex. 3, p. D0111. (2000 Census data suggest the estimated number of new households and new jobs in the metro area by 2020 will be substantially more than previously estimated.)
- [56] Ex. 3 p. D0111.
- [57] Ex. 24, p. 16 (Uttley); Ex. 25.
- [58] Uttley T. 154.156.
- [59] Ex. 7, pp. 45-48.
- [60] Uttley T. 178.
- [61] Ex. 24, pp. 14-15 (Uttley).
- [62] Thompson T. 527.
- [63] Ex. 24, p. 20 (Uttley); Ex. 25.
- [64] John T. 235-237.
- [65] Ex. 24, p. 15; Ex. 28, 29.
- [66] Ex. 18, p. 2; Ex. 19.
- [67] Ex. 39, p. 5.
- [68] Ex. 39, p. 5.
- [69] Ex. 12.
- [70] Ex. 12, p. 9.
- [71] Ex. 12, pp. 57-63.
- [72] Ex. 12, p. 14.
- [73] Ex. 12, p. 15.
- [74] Ex. 12, pp. 34-35; Ex. 18, pp. 16-17.
- [75] Ex. 12, p. 58.
- [76] Ex. 12, p. 59.
- [77] Ex. 36G.
- [78] Ex. 3, p. D00112; Ex. 20.
- [79] Ex. 18, pp. 11-12; Ex. 39, p. 6.
- [80] Ex. 30, pp. 19-20.
- [81] Uttley T. 191.
- [82] Uttley T. 191.
- [83] Ex. 30, p. 19.
- [84] Ex. 18, pp. 12-13; Pickart T. 68-85.
- [85] Ex. 3, p. D00048; Ex. 18, p. 508; Pickart T. 88-91.
- [86] Pickart T. 51.
- [87] Ex. 10.
- [88] Ex. 10, p. 3.
- [89] Ex. 30, p. 10.
- [90] Ex. 3, p. D00112.
- [91] Ex. 30, p. 11; Ex. 10, p. 97; Diaz T. 99.
- [92] Ex. 15, p. 5 (Diaz); Ex. 17; Diaz T. 110-111.
- [93] Ex. 30, p. 13; Ex. 16; p. 5 (Diaz); Diaz T. 119.
- [94] Ex. 30, p. 13.
- [95] Ex. 15, p. 5 (Diaz).
- [96] Ex. 8; Ex. 24, p. 13-14 (Uttley).
- [97] Ex. 3, p. D00040; Ex. 8, p. D00198.
- [98] Ex. 8, pp. D00198-200 (map misidentified as D00100).
- [99] Ex. 8, p. D00220; Ex. 24, p. 14 (Uttley).
- [100] Ex. 3, p. D00046; Ex. 8; Ex. 24, p. 17.
- [101] Ex. 8, pp. D00197-199; Ex. 24, pp. 17-18.
- [102] Ex. 8, pp. D00206-208.
- [103] Ex. 24, p. 16 (Uttley).
- [104] Uttley T. 167-168; Ex. 24, p. 21.
- [105] Uttley T. 190-194; Exs. 53, 54, 55.
- [106] Uttley T. 193-194.
- [107] Hunt T. 322-323; Dillerud T. 393-396.
- [108] Ex. 53.
- [109] Ex. 54.

[110] Ex. 55.
[111] Uttley T. 197-198.
[112] Ex. 18, p. 11-12 (Pickart); Ex. 3, p. D00274.
[113] Ex. 24, p. 00602-03.
[114] Ex. 46, p. 9-10.
[115] Ex. 36, pp. 36-47; T. 139-40; T. 489; Ex. 51
[116] Ex. 3, p. D00280.
[117] Ex. 2, p. D00060.
[118] Ex. 2, p. D00060; Another suggested modification related to the use of Highway 5-an issue that the Council and the City have resolved. The parties also resolved an issue over a recreational trail. T. 6.
[119] Ex. 1.
[120] Emphasis added.
[121] Minn. Rule 1400.7300, subp. 5.
[122] Emphasis added.
[123] Emphasis added.
[124] Minn. Stat. § 473.866.
[125] *Reserve Mining Co. v. Herbst*, 251 N.W.2d 808, 822-27 (Minn. 1977)
[126] Minn. Stat. § 473.866.
[127] The evidence not considered by the ALJ is the following exhibits and testimony: Exs. 39, 42, 43 and 45; those portions of Exs. 37, 37A and 37B dealing with Lake Elmo's ISTSs; and T. 415-445 and 457-475. Findings summarizing that evidence are attached as Ex. C.
[128] *Markwardt v. State Water Resources Board*, 254 N.W. 2d 371, 374 (Minn. 1977).
[129] *Cable Communications Board v. Nor-West Cable Communications Partnership*, 356 N.W. 2d 658, 668-69 (Minn. 1984).
[130] Minn. Stat. § 14.69.
[131] Ex. 8.
[132] Minn. Stat. § 473.857, subd. 1.
[133] Ex. 8, p. D00220.
[134] Ex. 8, p. D00197.
[135] Minn. Stat. § 473.175. Emphasis added.
[136] Minn. Stat. § 473.852, subd. 8.
[137] Ex. 40, pp. 4-5.
[138] Ex. 10, p. 4; Ex. 12, p. 13.
[139] Minn. Stat. § 473.146, subd. 1.
[140] Ex. 12, pp. 35-36.
[141] Ex. 10, p. 61.
[142] *American Heritage Dictionary* (2nd College Ed., 1982).
[143] Ex. 24, pp. 20-23, Ex. 52.
[144] Dillerud T. 380.
[145] Thompson T. 475-482.
[146] Ex. 3, p. D00113.
[147] Ex. 3, p. D00253.
[148] T. 393, 402.
[149] Ex. 18, pp. 12-13, T. 64.
[150] T. 75-6.
[151] *City of Brooklyn Center v. Metropolitan Council*, 243 N.W.2d 102, 105-07 (Minn. 1975) suggests that the Council should be accorded considerable discretion in regional sewer management.
[152] Ex. 17.
[153] Ex. 16, p. D00549.
[154] Conclusions Nos. 3, 13-14.
[155] *Nordmarken v. City of Richfield*, 641 N.W.2d 343, 348-49 (Minn. Ct. App. 2002).
[156] The City objected to inclusion of the affidavit in the record, however, it did not dispute its accuracy. The City does not appear to be prejudiced by its consideration.
[157] The City notes that § 473.515, subd. 3 was enacted prior to § 473.871. The provisions must still be read together and reconciled if possible.
[158] T. 495.

- [\[159\]](#) Minn. Stat. § 473.851.
- [\[160\]](#) Ex. 3, p. D00114, D00276.
- [\[161\]](#) Ex. 39, pp. 3-5 (Bohrer); Ex. 45, pp. 11-12 (Sparks); Hunt T. 265-266; Sparks T. 419-420.
- [\[162\]](#) Ex. 18, p. 2.
- [\[163\]](#) Ex. 18, p. 3.
- [\[164\]](#) Ex. 18, p. 3.
- [\[165\]](#) Ex. 37, pp. 46-48 (Moore).
- [\[166\]](#) Ex. 37, p. 47 (Moore).
- [\[167\]](#) Ex. 37A; Ex. 39, pp. 3-5 (Bohrer); Pickart T. 58.
- [\[168\]](#) Ex. 3, p. D00048 (9/11/02 presentation summary).
- [\[169\]](#) Ex. 3, p. D00048 (9/11/02 summary); Ex. 38; Ex. 39, p. 4; Ex. 43, pp. 3-5.
- [\[170\]](#) Grubb T. 461-464; Ex. 42, pp. 18-23.
- [\[171\]](#) Sparks T. 426-428; Ex. 39, p. 4.
- [\[172\]](#) Ex. 3, p. D00049; Sparks T. 423-424.